IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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UNITED STATES OF AMERICA	*	11-186-S
	*	
VS.	*	OCTOBER 15, 2013
	*	**VOLUME III**
JOSEPH CARAMADRE and	*	
RAYMOUR RADHAKRISHNAN	*	PROVIDENCE, RI
* * * * * * * * * * * * * * *	*	

HEARD BEFORE THE HONORABLE PATRICIA A. SULLIVAN

MAGISTRATE JUDGE

(Evidentiary Hearing)

APPEARANCES:

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15 OCTOBER 2013 -- 1:50 P.M.

THE COURT: Good afternoon, everyone. We're here in the matter of the United States of America versus Joseph Caramadre and Raymour Radhakrishnan. This is criminal matter 11-186-S and the purpose of today's proceeding is to hear oral argument in the aftermath of an evidentiary hearing that was held on September 30 and October 9.

Would counsel identify yourselves for the record, please.

MR. VILKER: Good afternoon, your Honor. Lee Vilker, Assistant United States Attorney, with John McAdams, also Assistant U.S. Attorney.

MR. MURPHY: Good afternoon, Judge.

Judge, Attorney William J. Murphy on behalf of Joseph Caramadre.

MR. OLEN: Good afternoon, your Honor. Randy Olen for Mr. Caramadre.

MR. THOMPSON: Olin Thompson for Mr. Radhakrishnan.

THE COURT: Good afternoon, everyone.

All right. I think, Mr. Vilker, as the party with the burden, why don't you start us off.

MR. VILKER: Thank you, your Honor. I wanted to begin by just briefly summarizing the legal principles

of what this hearing is about.

As your Honor has mentioned, restitution is determined by a preponderance of the evidence standard. The Government has the burden of proving that it's more likely than not that a certain victim suffered a certain amount of losses. The Federal Rules of Evidence do not apply to proceedings to determine restitution so hearsay evidence of the type that the Government introduced in this case, the agent testimony and summary charts are all fully admissible and sufficient to satisfy the Government's burden.

And finally, the law is that a reasonable estimate of the harm is sufficient when a precise amount cannot be determined.

On both the annuity side and the bond side the Government has endeavored through many, many hours at this task to come up with precise calculations and we hope we've done so; but even if we've failed in that, we believe we've provided the Court with reasonable estimates of damages for both the annuities and the bonds.

Your Honor, as this hearing began, we thought that the focus of the hearing would be predominantly on the calculations and the methodology used to determine the amount of losses sustained by the insurance

companies and the bond issuers. While there has been some time spent on those issues, and I will be addressing those in a short while, a large part of this hearing was in our view kind of misdirected at an attempt to relitigate and redefine the scope of the scheme involved.

Defendants in this case in our view have tried to relitigate this issue by arguing that the losses should be limited solely to the 23 individuals only that are identified in the statement of facts by asking questions of witnesses such as did this annuity application ask the health of the annuitant, which isn't even part of the indictment or the scheme that's alleged; and asking other questions that suggest an effort to go back on the admissions of guilt that these Defendants have made.

Now, these issues have already been decided in this case. The Defendants have pled guilty to executing a sweeping scheme to defraud. The Government would suggest that there are three documents available to this Court to set the parameters of what the scope of the scheme in this case is, the indictment, the statement of facts signed by these Defendants, and the prosecution version that's contained in the presentence report.

Now, the indictment charges in Counts I through the remainder of the wire fraud counts a scheme to defraud that began in January of 1995 and ended in August 2010. The Defendants both --

THE COURT: January of 1995?

MR. VILKER: January of 1995 through August of 2010.

Now, the Defendants pled guilty to one substantive count of wire fraud involving a communication concerning one of the annuitants, Edwin Rodriguez, but what they actually pled guilty to was committing this scheme to defraud and doing it through the one particular wire that they pled guilty to, but they pled guilty to the entire scheme.

The indictment charges that beginning in 1995, Mr. Caramadre began investing in annuities using terminally-ill individuals, paying them and not informing the insurance companies that he was doing so and that he did so on his own behalf, on behalf of his family members, his associates and his clients.

For the clients, the indictment alleges that Mr. Caramadre either received commissions from the insurance companies or, in addition, there were a number of occasions in which he shared the profits that were earned in these annuities.

Now, paragraph 27 of the indictment describes the scheme and the manner and means in which the scheme was devised, and it indicates that Mr. Caramadre and Mr. Radhakrishnan fraudulently obtained millions of dollars by making material misrepresentations to, one, terminally ill and elderly people, their family members and caregivers in order to obtain the identity information and signatures for use in furtherance of the scheme; two, to insurance companies; three, to bond issuers; and four, to intermediaries, including brokerage houses and broker/dealers.

The indictment then goes into tremendous detail about the numerous fraudulent acts that were taken by these Defendants in furtherance of the scheme including deceiving terminally-ill people to sign documents; opening up annuities and brokerage accounts in their names without their knowledge or consent; lying to the companies involved, including the insurance companies, brokerage houses and broker/dealers; providing false information on application forms; providing false information to obtain death certificates; using nominees to conceal ownership, and taking other steps to conceal the fraud such as staggering deposits and delaying death claims. That's the scheme that Defendants admitted to orchestrating.

THE COURT: Can I just -- and I didn't want to interrupt what you were laying out, Mr. Vilker, because that was really one of my questions that I came on the bench with and you're addressing it, which is what is the scope of the scheme for purposes of forging a restitution award. But is the scheme that you just laid out what we would find if we limited our read of the indictment to the counts and the paragraphs that are incorporated by reference into the counts as to which the guilty plea was made or are you more broadly including the entirety of the indictment?

MR. VILKER: No, your Honor. It's only the counts to which the Defendants pled guilty. The first count they pled guilty, Count IX, I believe, which was the scheme to defraud, which is pages 1 through 40 of the indictment all come within that one count that they pled guilty to.

So it includes -- and this is why the argument that defense is making about limiting it to the specific people, terminally-ill people mentioned in the statement of facts, it ignores everything else in the indictment including all the other misrepresentations that have nothing to do with the misrepresentations to the terminally-ill people, lies to the insurance companies, the brokerage houses, the money laundering

part of this, lies to obtain death certificates and many other parts of the scheme to which they all pled guilty and which they admitted specifically in the statement of facts, which is the next point I wanted to get to.

The statement of facts was signed by both Defendants. I read it pretty much verbatim at their change of plea hearing in November of 2013. Both Defendants stated under oath that they listened to every word I said, that they signed the statement of facts and every single word in the statement of facts was true.

In that statement of facts, which was a very detailed statement of facts, the Defendants admitted to making false representations to the insurance companies concerning the relationship between the owners and the annuitants. They admitted taking steps to conceal from the insurance companies the use of terminally-ill individuals. They admitted lying to the broker/dealers about how the annuitants were found and whether they were paid. They admitted lying on the application forms concerning the finances and the investment history of the terminally-ill people. They admitted that Mr. Caramadre fraudulently concealed his true ownership in the annuities and bonds by putting them in

the names of other people including Mr. Radhakrishnan; and they admitted that the terminally-ill people themselves were deceived into signing the annuity and brokerage account applications.

So they've admitted already a great detail, essentially all the pertinent facts that are in the scheme to defraud and in the indictment.

And the third and final document that the Government would cite to your Honor that we believe the Court can rely on in determining the scope of the scheme is the prosecution version that the Government submitted with the presentence report.

Under Rule 32(f) of the Federal Rules of Criminal Procedure, the parties have 14 days after the issuance of the presentence report to object to any facts contained therein. The Defendants have not filed any objections whatsoever to the prosecution version and, therefore, those facts must be accepted as true as well. The reason this procedure exists is that if a Defendant objects to a statement contained within the prosecution version, the Government is then given an opportunity to respond to that objection and provide the Court with evidence to support the statements in the prosecution version.

So by ignoring that procedure, the Defendants

have in effect deprived us of our ability to prove all those facts that we would otherwise be able to prove as true. So I'm not going go through all that. I believe it's 32 pages long, the prosecution version, but it provides significant additional details even beyond what's included in the indictment and certainly beyond the statement of facts concerning other terminally-ill individuals who were deceived and other acts in furtherance of the fraud scheme.

So those three documents in our view provide the Court with the parameters of the scheme. The scope has already been litigated, admitted to and resolved in this case. And we would submit to you, your Honor, that the scope in this case is any investment made by Mr. Caramadre, his friends, relatives, associates, clients from 1995 through 2010 in which an unrelated terminally ill or elderly individual was named as a co-owner or annuitant. Given that definition, we did take out a couple of the investments in which they were mistakenly listed in which the two individuals were related, but all the other annuities and bonds and brokerage accounts that are in our documents fall within that definition.

THE COURT: The definition that you just described from a temporal perspective for the annuities

goes back to 1/1/95 but not for the bonds, correct?

MR. VILKER: The scheme goes back to 1995. The scheme is using terminally-ill individuals on investments. Factually, the bonds didn't come into existence for purposes of this scheme until 2006.

So the annuities temporally are from 1995 through 2010, but the bonds the Defendants just began investing in those in 2006. But as a matter of interpreting the indictment, any investment using terminally-ill individuals would come within the scope of the scheme as defined in the indictment.

Now --

THE COURT: Let me -- something that I've been kind of thinking about and it probably makes sense to just ask the question now and I actually think given the nature of the Rules of Evidence what you just said may have solved my problem, but I don't -- clearly in terms of thinking about the scope of the scheme, one of the things I need to focus on is that the transactions are all within the temporal scope. As I read the operative documents that you've just mentioned, the scope as to the bond issuers and CD issuers begins in 2006. I don't actually have an exhibit that tells me what's the operative date for each of those transactions, but I think I have a representation that

you just made to me that those are all 2006 or later investments.

MR. VILKER: That's correct, your Honor.

THE COURT: I think that may be enough, unless the Defendants raise a question as to that. If they do, then I think the Government would have to sharpen its proof on that point. On the annuity side, I have dates.

MR. VILKER: Right.

THE COURT: But I don't on the bond side.

MR. VILKER: We could very easily submit to your Honor a chart listing the dates on which each of these brokerage accounts were opened. It's all from 2006 to 2009 but that would be a very simple thing that we could do.

THE COURT: I think what you just said as a representation of counsel is probably enough, unless the defense raises a question about that in which case I think that the Government is going to have come forward with something a little stronger.

MR. VILKER: Sure.

Now, we could go back on each of these annuities and each of these brokerage accounts and go through one by one and provide evidence on each single one, whether it's a lie on an application form, a lie by phone to

one of the companies, deceiving a terminally-ill person that was named, putting the money in someone else's account, someone else's name, staggering these deposits. We could go back in each of these and provide evidence to your Honor as to why each of these factually falls within the scheme. To do so would convert this hearing into a mini-trial and I think goes beyond the scope given the indictment, the presentence report and the --

THE COURT: Statement of facts.

MR. VILKER: -- statement of facts. But to the extent your Honor has any questions on any particular ones or the Defendants raise one or two that they have a question with, we could certainly go back and provide further information on any of the transactions to your Honor.

Now, getting to more of the mathematical part of this hearing --

THE COURT: Before you do, I do have a couple of questions. If I can find your -- there were a couple of instances where the information that laid out the connection to the scheme just raised a question in my mind. One was Charles Buckman where the description says "annuitant was believed to be terminally ill." And I didn't know whether that meant that he wasn't?

MR. VILKER: Mr. Buckman was very ill. To my understanding, he's still alive. He gave a Rule 15 deposition in this case in the investigation phase of it in which it was kind of mixed testimony. He did testify that he had some knowledge that something was being opened in his name with death benefits; however, there was false information on various forms that he signed. He was given -- he was signed up with the intention of him being terminally ill and to have death benefits accrue on his death. I think factually it may have turned out that he was not terminally ill.

THE COURT: Okay. How then was there a loss?

MR. VILKER: I just need to take a look at the charts.

On the bond account, the only one that's listed, even though there was a bond account with Charles Buckman, there's only listed Maureen Buckman, who was his wife. She was terminally ill, and they may have profited on that.

THE COURT: Right. No, it's on the annuity list, and the first annuity that's listed for him is a negative or a positive for the insurance company so no loss but maybe ten down the first page there's a total loss of $59,000 in his name.

MR. VILKER: It appears from the chart, your

Honor, again, I'd have to go back to get precise information that because he did not pass away, they were unable to submit a death claim. So it appears that it was surrendered and that's why the payment to the beneficiary is less than the total premiums.

But when you add in the $100,000 in bonuses and the $110,000 in commissions, when you do that all together, it comes out with the loss of $59,000. It's really the bonuses and commissions that drove that particular loss.

THE COURT: Right. I understand how that works.

Sorry I'm taking you into the weeds, Mr. Vilker, but I do have a few others. Now, these are questions on the bonds. There were a handful. Daigle is one where there seemed to be a relationship between the co-owner and the owner, a father and son; similarly, Caterina Franco where the co-owner is the terminally-ill mother of a client.

MR. VILKER: On Mr. Daigle, they are father and son, the owner and the co-owner. There's a little bit of a back story on that and, basically, even though that account was in Mr. -- both the Daigles' names, it was Mr. Caramadre who put his funds into the account in their names. And part of the scheme that we've alleged in the indictment is that he did so to conceal his

ownership, in which he represented to that brokerage house that he was the owner of these bonds and which he really wasn't. And he received most of the profits and passed along sums to the junior Mr. Daigle.

It's basically the same situation with Ms. Franco. That was put in Mr. Radhakrishnan's name. And neither Caterina Franco or her relatives or Mr. Radhakrishnan were the owners. And there were other representations that were made to the companies in terms of financial background of Ms. Franco. But those are two instances in which the individuals were related but other parts of the fraud scheme came into play.

THE COURT: I think those were all my down-in-the-weeds questions.

MR. VILKER: So now in trying to calculate the loss on the annuities, it was very clear in various documents and also spelled out in the indictment that the strategy here was to make very, very risky investments. And if the high amount of risk paid off, Mr. Caramadre would be able to cash in on the annuities with a significant profit. If what happened is what happened in most of the cases the risk didn't pay off, the annuity would drop in value and the insurance company would be left having to pay the death benefit

even though the account value had decreased significantly. And as a result of that dichotomy between the value of the account on the date of the death and the death benefit, the insurance companies suffered significant losses. To that was added the bonus payments the insurance companies put into the account typically shortly after application and the commissions that Mr. Caramadre and his co-conspirators in this case shared in this case, both of which the bonuses and the commissions each typically was in the range of five percent the value of the amount of the money that was put into the annuities.

So in a $1,000,000 annuity, no matter what happened in the market, there was already a $100,000 loss assuming the monies, the annuities that had these bonus payments.

THE COURT: Let me interrupt you there. A question that's concerned me and this relates to the scope of the scheme and the fact that from '95 until 2007 we have the scheme as you've articulated it, and then beginning in 2007 it becomes a conspiracy. The named conspirator of course is Mr. Radhakrishnan, and there are unindicted co-conspirators. Does the analysis for the pre-conspiracy period change in terms of the involvement of the unindicted co-conspirators

because there is not a conspiracy during that time period? How do I analytically look at scope and decide what transactions are in and out for what I'll call it the pre-conspiracy period where the hook involved the conduct of an unindicted co-conspirator?

MR. VILKER: Well, I'm virtually certain that the scheme to defraud that's alleged in the indictment that defense pled guilty to goes into great detail about that, that the scheme was during that point in time -- the primary brokers or registered representatives were the two unindicted co-conspirators, Mr. Hanrahan and Mr. Maggiacomo; that Mr. Caramadre would on his own behalf and on behalf of his clients direct them to submit annuity applications to the insurance companies that had these death benefits for himself and for his clients. And then over time there were different commission-sharing arrangements between them, which Mr. Caramadre would get a piece of the commissions depending on -- they were different. Mr. Hanrahan had an ownership interest in Estate Planning Resources so that kind of flowed to the corporation. Mr. Maggiacomo had to pay Mr. Caramadre a percentage of the commissions that they had agreed upon.

So from the very beginning of the scheme, and

it's laid out in the indictment, the scheme was to open up these annuities, find terminally-ill people and then I guess what I should add to that is Mr. Caramadre was the moving factor back then in locating all the terminally-ill people that were used on all the annuities before Mr. Radhakrishnan became involved. He visited a house of compassion in which AIDS people were residing. He located any other annuitants that were somehow connected to his family and had small life insurance policies and, therefore, he figured out that they were terminally ill.

So he was the one identifying the terminally-ill people. He was instructing Mr. Maggiacomo and Mr. Hanrahan to submit applications. He'd say use this terminally-ill individual with this client that you have, and then he would receive a portion of the commissions.

THE COURT: That's all within the scope of the scheme and, therefore, there isn't an aspect of the conspiracy that we don't look at when we go into the pre-conspiracy period?

MR. VILKER: Right. I believe the way the scheme in the indictment is written in great detail and the conspiracy basically incorporates -- the conspiracy comes pretty quick. It basically incorporates all the

allegations in the scheme to defraud count and then it adds some charging language.

(Brief interruption.)

THE COURT: Okay. Let's take a ten-minute break, see if we can fix what's broken. If we can't, given we do have a stenographic record and enough light to work, we'll resume and make due. Let's see if we can solve the problem with a short delay.

(Recess.)

THE COURT: I apologize for the interruption, everyone. It seems like the lights are back on but because the microphones were still going crazy we've turned them off so we will not have a recording record of this hearing. The only record will be the stenographic record that Ms. Clayton is creating for us. So I understand no one has a problem with proceeding on that basis.

MR. VILKER: We certainly don't, your Honor.

MR. MURPHY: Judge, for the record, Mr. Caramadre does not have a problem with that.

MR. THOMPSON: No objection, your Honor.

THE COURT: Let's proceed. Hope you remember where you were, Mr. Vilker.

MR. VILKER: I do, your Honor. Actually, the short break gave me a chance to go back and look at the

indictment to address the question your Honor raised right before the break. And I just wanted to direct your Honor to paragraph 50 of the indictment which talks about the sharing of commissions before the time period in which Mr. Radhakrishnan became involved. It indicates that John Doe Number 1 and John Doe Number 2, Mr. Magiaccomo and Mr. Hanrahan, received millions of dollars in commissions from the insurance companies based on the use of terminally ill and elderly annuitants. And upon receiving these commissions, they shared their commission with Mr. Caramadre and that after Mr. Caramadre gave up his securities license in or about 2003, he was prohibited under the securities laws from sharing commissions, and to disguise the fact that he was sharing commissions Mr. Caramadre instructed Mr. Maggiacomo to falsely indicate on checks payable to him that commission sharing payments he was making were for legal fees or rent.

Then if you proceed to paragraphs 70 through 88, they provide a number of specific instances in which Mr. Caramadre, both on his own and the cases where he was a broker, submitted annuity applications naming terminally-ill individuals.

In paragraph 70 he talked about one individual named Mr. Aynalem, A-Y-N-A-L-E-M, who has testified

that he didn't know anything about any annuities being opened up in his name, and then it continues to give other examples of other annuitants that were submitted.

There's one Ms. Paneto, paragraph 73, that it was submitted -- an application was submitted by John Doe Number 2, who is Mr. Hanrahan, and the commissions were shared with Mr. Caramadre. And it goes on to indicate that false information was submitted to Golden America on the paragraph 76 in a death benefit claim.

There are pages of this, your Honor. I just wanted to point that out to the Court.

THE COURT: That's helpful.

MR. VILKER: The next point I wanted to get to was the annuities. As I mentioned before, the basic formula is pretty simple from a mathematical perspective. It's the difference between the value of the account and the amount being paid out to the beneficiary and then adding in the bonuses, adding in the commission and taking away the fees.

I didn't understand there to be any objection by the defense as to this basic formula. Instead my understanding of defense's submission, the defense is primarily arguing that the loss should be limited not to all of the annuities but just to the 23 terminally-ill individuals that were listed in the

statement of facts. The statement of facts specifically says that the identities of the terminally-ill individuals that were deceived include but were not limited to the following 23 individuals. So it was clearly contemplated at that time this wasn't meant to be an exhaustive list. The indictment names many more people as does the prosecution version in the presentence report.

Then beyond that, your Honor, the other annuities, even if one of these named individuals isn't there, all come within the scheme for various reasons including the lies to the insurance companies, the lies to the broker/dealers, sharing commissions illegally and other aspects of it.

The Government, and particularly Agent Niro, spent hundreds if not thousands of hours poring through the documents provided by the insurance companies in order to plug the numbers into the master chart that he did. Some of the numbers he was able to verify by looking at the raw documentation provided by the insurance companies such as checks being mailed out, either to the beneficiaries or checks that were sent as premium payments.

Other relevant pieces of financial data he had no choice but to rely on the insurance companies

reporting back to him accurately what the particular number was. It included the amount of commissions they received and the value of the account at the time of payment and then ultimately the amount of fees that they earned.

We went back to each of these insurance companies and explained to them that we were attempting to put together in well over 200 annuities an annuity by annuity calculation to determine the amount that each and every insurance company lost or gained on any particular transaction. The insurance companies responded back to us with that information that Agent Niro put in his chart.

The insurance companies were told on the commission side that what we were looking for was the actual commissions that were paid, not those that were paid and then a portion of which was charged back because they were paid early. A number of them indicate on the charts they submitted both columns, charged back and the commissions, and we only took into account the actual commissions that they paid without any charge-backs or after a charge-back was taken into account now, as your Honor can see from that chart, there are a lot of moving pieces, both in terms of the amount of material and the different things that

happened factually with many of these annuities.

Particularly after the allegations in this case became public in 2009, there's a lot of different activities with these different annuities and some of them were being surrendered early, some were in litigation, and we had to rely on the insurance companies to tell us the amount that they were paying out on these and commissions and the other pieces of data.

Now, our only effort in this case is to provide the Court with as accurate a list of the losses that each insurance company suffered. We've done our best to do this. I personally have gone through the numbers hundreds of time. I know our counsel has an IRS agent. I can tell you almost every occasion I go through specifically I find a little mistake and it gets corrected.

We sent these charts to Mr. Caramadre's former counsel before the start of trial last fall and his two former attorneys went through this line by line and they responded to us with some mistakes that they found and they were right. We went back and it was mistakes that the annuity had been surrendered and we hadn't realized it. We contacted the insurance company, got the accurate number and updated the chart.

In this hearing, we were frustrated by what either intentionally or unintentionally was really kind of an effort to play "gotcha" with the IRS agent. Obviously Mr. Caramadre clearly knew and his counsel knew that a mistake had been made on the chart and Security Benefit gave us the wrong information and we went back and looked at the raw material and found out that they put down the amount of the voided check instead of the actual check.

These charts, first of all, they were given to prior counsel a year ago. They were submitted by the Government in this proceeding at the beginning of August. The Defendants have had these charts for two months. If they in some way know the ins and outs of these transactions better than we ever will, if there's a mistake made on it, it's incumbent on Defendants to let us now. Our only interest is to provide accurate information. We will go back, verify the information, we'll get the correct numbers. We're not interested in getting the insurance companies money they're not entitled to. We want an accurate representation.

Again, after this hearing if the Defendants over the next couple of weeks find something, I request they let me know immediately. We'll contact the insurance companies; and if a change needs to be made, we're

going to make it. In the end, based on the removing one annuity in which the account owner and the annuitant were related and shouldn't have been on the chart reducing by about $400,000 the Security Benefit one in which the error was made, we come up with total loss attributable to Mr. Caramadre of $33,913,257. And while we completely agree with the over-arching objection Mr. Thompson made, Mr. Radhakrishnan should not be held responsible for things that happened long before he became employed by Mr. Caramadre, the loss attributable to him for annuities that were applied for after July 1st, 2007, totals $2,952,069.

Now, we believe this is an exact calculation of the losses. Notwithstanding the possibility of human error, it's our belief that's accurate. We certainly believe this calculation, this hundreds of hours that went into it satisfies the Government's burden of a reasonable estimate of the losses by a preponderance of evidence.

Can I move on to the bonds now?

THE COURT: Yes.

MR. VILKER: The bond portion of it was much more complicated from a mathematical perspective. We spent some time internally trying to come up with equations and calculations. In the end, we weren't

that far off, but it became clear that in order to determine how much these bond issuers lost we would need to retain an expert. We went out and we retained one of the leading experts in the world on evaluation of corporate bonds and death-put bonds in particular. This is -- I'm talking about Dr. Kalotay, of course.

Dr. Kalotay, the first time we typed his name into our system, out popped an article that he wrote on death-put bonds that was in Mr. Caramadre's computer. So he seemed to be someone the Defendant relied on in this case. Mr. Caramadre (sic) wrote numerous articles on death-put bonds and actually before we ever got in touch with him in this case, secured a United States patent that was designed specifically to measure the value of death-put bonds.

Now, he testified as to the formula that he used to determine the losses to the death-put bond issuers. This wasn't a formula that he came up with in this case. He applied that formula obtained in that patent to the facts of this case.

It's very clear to the Government that the gains that Mr. Caramadre and his co-conspirators received were very clear. It's the difference between the amount of money he put in and the amount of money he put out, and it came very close to $12 million.

And it was our view, and Dr. Kalotay confirmed it, you can't make $12 million out of thin air. If you're making $12 million, somebody on the other side of the transaction is losing that amount. That someone in this case were the bond issuers who were required to pay back the value of the death-put bonds in some cases 30 years or so before they otherwise would have. So if it's a $100,000 bond that they weren't going to have to pay for another 30 years, they were required to pay it back almost immediately.

On the other hand, they were relieved of the obligation to pay the coupon rate, which is three to five percent that they were required to pay per year.

So it became very clear that the difference between those two, how much it cost them to pay early, the time value of that money minus how much they're saving by not having to pay the interest rate was really going to come down to the real basic principles of how much these bond issuers lost.

THE COURT: Mr. Vilker, just a question on the bond issuers. On the insurance side, it's clear that the insurance companies have been as victims very engaged. They provided you information so you've been hearing directly from them about their losses.

On the bond issuers side, that doesn't seem to

be the case. And there was some testimony suggesting that the issuers may not even be aware of their loss until it's brought to their attention by the Government or by becoming aware of the case. Is that a material difference in thinking about how to calculate restitution?

MR. VILKER: It's really not, your Honor. First of all, I think generally you're correct. There's been much more engagement from the insurance company on the loss of the annuities. There has been some contact with bond issuers, many of them submitted restitution claims to the Court and they did similar type calculations and they came out basically very close to what Dr. Kalotay determined to be their losses.

These companies that issue these bonds are huge financial corporations like Bank of America and GMAC, and the reality is the relative small amount of money that they lost here in the scope of their business was relatively minor. So they weren't actively engaged in the investigation as the insurance companies were.

We did reach out to them and received some information but, you know, the amount of effort they're going to put in to recover losses is going to be in some relation to how big those losses are to the overall business. From a legal perspective, it's

completely irrelevant. Whether they recognize or not, whether they're engaged or not, they're victims and they're owed money in restitution.

When I was going back to Dr. Kalotay and he recognized he could be somewhat difficult to understand mostly because he's so far above the rest of us in this area, how he explained it to me that made the most sense, finally had the light go on in my head when he used the analogy of being like a mortgage in which the bond issuers are a homeowner and they need to borrow money and they have a mortgage of three percent, four percent that they're paying out to a bank. All of a sudden the bank comes in and says pay back the mortgage immediately. And they don't have the money available. The only way they can pay back that mortgage is to go out in the market and borrow more money. Because as a matter of necessity, because the bond values selling on the market were below par, below that $100, that meant that the rate that they would have to get to pay back that bond would be higher than the rate of the bond, which would mean that they have to be like a homeowner having to pay back a four percent mortgage by going out and getting a seven percent mortgage.

And the rate varied from bond issuer to bond issuer. Some of them had better credit than others.

Some of them had to get it at six percent instead of seven percent. Some had to get it at eight percent. And we looked at different categories of these companies and determined approximately at that time what their borrowing costs were and determined how much more it would have cost them to pay back that money.

He testified this is how those companies do business. They don't have piles of cash hanging out ready to pay back whoever is cashing in a bond. Any debt that they have, they have to go back and borrow more money to repay the debt. It's unfortunately the facts of American corporations as they exist now.

THE COURT: And as I understand your argument, it's not just speculative to say given the nature of the scheme that the bond issuers experienced a loss because the nature of the scheme was that these were bonds that were necessarily trading at a discount below par.

MR. VILKER: Right.

THE COURT: So if I understood Dr. Kalotay's testimony correctly, that meant that in that moment, that entity's cost of replacing those dollars was going to be higher than what they were paying for them in connection with the issuance that now is suddenly prematurely due. So you necessarily have loss, what's

left is how you calculate it.

MR. VILKER: It took me six months to get that. That's exactly what Mr. Kalotay testified to. They would not have purchased these bonds unless they were far below par value, otherwise there's no profit when the co-owner passes away.

So using those factors, the prevailing rates and other factors, the likelihood that it would have been put back to the issuer in any way, if someone else owned it there's always a possibility that that co-owner could have passed away or the owner and gone into the estate. That was factored in. And he came up with a calculation issuer by issuer and his total losses that he calculated were $12,397,095 and the losses after July 1st, 2007, were $12,220,241.

Now, Dr. Kalotay did testify that he made some estimates in his calculations. I believe the one he testified was the biggest estimate was he divided the companies into kind of broad categories of their credit-worthiness. And he said that in reality if you want to look at a specific company on a specific date they might be slightly different than the prevailing rate that he used in calculations but that would have required an enormous additional amount of hours spent examining these bonds.

So we believe these numbers that Dr. Kalotay testified is very, very close to the actual numbers and certainly a reasonable estimate of losses that these bond issuers suffered.

I did want to point out in my comments, unless the Court has any questions, is under the guidelines, which is the other part of the analysis here, the guidelines are very clear that if say we fail completely in giving a reasonable estimate of the losses, the guidelines direct the Court to look at the gains to determine the guideline total under Section 2B1.1. In this case, the gain is $11,959,820.

THE COURT: I do have one final question for you, Mr. Vilker, and this is really to confirm my understanding. Some of the things that the Defendants have filed have emphasized the victim status of the terminally-ill individuals who are identified in the plea agreement. Those victims are not the subject of a restitution hearing and my understanding is that is because of the nature of the loss that was inflicted on them is not a property loss and therefore the law of restitution doesn't provide them with an economic remedy. Have I got that right?

MR. VILKER: That's exactly right, your Honor.

THE COURT: Okay. Thank you, Mr. Vilker.

Mr. Thompson? Mr. Murphy?

MR. THOMPSON: I'll go first, your Honor. Thank you.

Thank you, your Honor.

At the outset, I would suggest to the Court that the Government's suggestion that the indictment serves any evidentiary value whatsoever is simply incorrect. It's not true at all. An indictment is an accusation, and it's only once we've gone through the process in Court that we can determine what facts have been proven and what facts have not been proven. And it is not the case that when you plead guilty to a particular charge you plead guilty to all the underlying facts the Government initially allege support that charge.

In this case we know that for certain because the parties as part of the plea agreement came to a very specific agreement about the facts which were being agreed to. And if the Government's argument was correct that the indictment had been admitted to, then they wouldn't have needed an additional agreed to statement of facts because they would have been of the position that everything in the indictment has now been deemed to be true.

But they weren't in that position. That's why they wanted Mr. Caramadre and Mr. Radhakrishnan to sign

on to an agreed statement of facts, and statement of facts that was written by the Government and it was a requirement of the plea that these gentlemen sign on to it and agree to it.

And Mr. Vilker is absolutely correct. They did review it; they did sign on to it. It was read essentially by Mr. Vilker as he stated and agreed to in Court. Those are the facts of this case.

THE COURT: Let me stop you there, Mr. Thompson, because you're raising something there that I've given a lot of thought to. While there isn't a lot authority in the First Circuit, I found a fair number of cases in other circuits that seem to say differently. They seem to say that in looking to define the scope of offense for purposes of setting restitution that the Court considers the plea agreement, the plea colloquy, the statement of offenses as you said, but also the indictment. And I'm looking now at -- this is **United States versus Emor**, E-M-O-R, 850 F.Supp.2d, 176 from the District of Columbia, 2012. But that's just an example. We found many cases stating the same proposition.

So I wonder if you have authority in this circuit for the proposition that the statement of facts in the plea agreement in effect supercedes the count of

the indictment as to which that same plea agreement to plead guilty.

MR. THOMPSON: I don't have specific authority, and obviously I'm confident your Honor would have found it and looked for it if there was supporting authority one way or the other. Apparently, there's not. My suggestion would simply be, frankly, review the cases and see how distinguishable they are. I don't know offhand.

But if the Government is seeking an agreed statement of facts then they should be bound to their agreed statement of facts and not come in later and say, yeah, but a certain number of grand jurors thought such and such. That doesn't have the evidentiary value and the kind of reliability that your Honor is required to have before you for evidence you consider when you're making a restitution order.

The cases your Honor referred us to made very clear that your Honor needs to be considering reliable evidence. Now, no doubt about it, your Honor, the Government's burden of proof is relatively low. It's a preponderance of the evidence standard. And at least one of the cases that you referred us to, the Gushlak, G-U-S-H-L-A-K, and also the -- again difficult name, A-D-E-T-I-L-O-Y-E, Adetiloye, I suppose made it very

clear it was a very low standard. That case suggested that the Court could consider things like testimony, sworn testimony of an investigating agent or sworn submissions by the actual companies that suffered these losses.

I would suggest in this case, your Honor, that you received neither of those things. To be sure, you received testimony of Agent Niro, but I would suggest he was not the investigating agent in this case, and he made this clear as well although he spent countless hours on this case. He was essentially a calculator. He would get documents from these insurance companies. He would plug them in to the spreadsheets and he would do the formula. That's what he did. And he testified that he didn't double check or he didn't look to backup documents. In some of the cases he did.

THE COURT: He said he did. He said he did when he could.

MR. THOMPSON: Okay. But he didn't say how many. For that reason, I would suggest that you have no idea how many he was able to do that on. And he did testify, and we were standing here with that large eight-by-six page document, and he testified to your Honor that he didn't know whether any of the numbers on that entire document were correct.

So I would suggest that for purposes of the case that your Honor directed us to, the two cases, that testimony was not sufficiently reliable because, although you had an agent, he was just testifying as to what the companies told him. And the companies didn't file this information under oath. They didn't come and explain and take an oath or sign an affidavit. They simply sent in the information. And the case makes clear that you need to have sworn testimony or sworn evidence from the companies. The fact that --

THE COURT: I don't think you necessarily have to have sworn -- I think at this phase the litmus test is reliability. And if the Government makes a presentation that meets a threshold level of reliability, then it then goes to the Defendant to start to poke holes in the reliability of that information.

I mean, one of the things -- I think one of the teachings of those two cases was that in a circumstance where a lengthy trial is averted by a plea agreement, the evidence that the Government would have presented at trial, which the Government has, but hasn't yet converted into the form of admissible evidence, that the restitution hearing is supposed to be structured so that it doesn't replicate that three-month trial. The

Government is being asked -- and in each case I think the Court was aware that the Government had a treasure trove, if you will, of potential evidence. And at the restitution phase, the Government is asked to come forward with enough evidence to reliably create a way to calculate the losses. Then the Defendants can look at that calculation and say that's not reliable and here's why. That's wrong. That one is wrong.

MR. THOMPSON: Yes, this Adetiloye case states that the Government must prove restitution is warranted by a preponderance of the evidence. We all agree on that. It follows: General invoices which purport to indicate the amount of loss but do not provide further explanation are an insufficient method of proof.

And it goes on: Whereas here the Defendant has objected to the amount of loss attributable to him, the Government may meet its burden of proof by testimony from the postal inspector -- and there's a citation -- or a sworn statement from the victim outlining the losses sustained.

Those are the two examples of methods the case provides, but the essential requirement here is that the evidence has to be sufficiently specific and reliable. And I would suggest in this case you don't have reliability. And right now for the purposes of

this I'm talking essentially about annuities and the insurance companies, your Honor. You don't have evidence of reliability. Agent Niro is not able to give a stamp of approval or a stamp of validity or reliability to the claims that the insurance companies are making. And the insurance companies did not provide documentation under oath to him and the Government has not made any showing of what those specific numbers that the insurance company provided.

I would suggest, your Honor, that particularly when no one from the company like an actuary or an accountant has actually signed onto these numbers, I would suggest that financial information from an insurance company inherently lacks reliability because it's the purpose of every corporation to make money and that would be their goal in returning restitution demands is to make money. They have a financial incentive to exaggerate their loss in this case and the incentive cannot go away and their claims cannot be made more reliable by the fact that an agent is standing up there saying those are numbers in the spreadsheet as opposed to the insurance companies doing it themselves.

THE COURT: But, Mr. Thompson, don't the Defendants have -- and I think there's some discussion

in one of those cases as to whether this approach, the approach I'm about to articulate is an inappropriate shifting of the burden to the Defendant, and the Court said no, it's not. And I ask the question in the same spirit.

Given that the Defendants, first of all, have all the documentation that the Government has relied upon and have the added experience of having lived through the event and therefore are really better situated than the Government to poke out errors, once the Government has come up with something that hits the level of reliability that we've got here with Agent Niro's testimony, with information provided by the insurance company, with in all instances where he was able to corroborate from the evidence that was collected and in every instance where the Defendants have raised a question, the Government has, as Mr. Vilker said, gone back, examined and fixed if that question raised an error, why -- how can I say it's not reliable just because it doesn't -- it's not attached to an affidavit? Because I don't see that requirement in the statute. Obviously, that particular case refers to affidavits as a way to reliably claim the evidence in court, but I don't think that's the only way.

MR. THOMPSON: I would suggest to your Honor

that perhaps that's not the only way but no other way was achieved here. We have a joint statement of facts, we have testimony from the agent who didn't have personal knowledge of the particulars, and then we have hearsay testimony from companies that have a motive to lie and clearly made some mistakes. So I don't think we have any indicia whatsoever of reliability.

THE COURT: Isn't the starting point that I have here on the admission on the insurance side that the scheme caused millions of dollars in losses?

MR. THOMPSON: Yes.

THE COURT: That's baseline. I know there's losses and know the losses are in the millions.

MR. THOMPSON: Yes.

THE COURT: And now the Government's burden is to come forward with reliable evidence, and "evidence" may be too strong a word, to perform that calculation.

MR. THOMPSON: And I contest that they have provided reliable evidence. They have provided, once again, statements of a witness who doesn't have personal knowledge and hearsay testimony by people motivated to exaggerate their losses and that is not enough.

THE COURT: What would be enough?

MR. THOMPSON: If they had statements from

accountants from these firms come in and they were subject to, for example, cross-examination. That could be enough.

THE COURT: But isn't that exactly what the case law tells us the restitution hearing is not supposed to become?

MR. THOMPSON: I don't think so. I don't think so at all. The purpose of the restitution hearing, your Honor, is certainly not to retry the case that did not happen. But this idea that because it would be a big burden to put on the witnesses to talk about their loss or to actually verify the loss because that would be a big burden therefore it's not necessary is completely wrong, and I don't think it says that in any of the case law. What it says is the Defendants are entitled to due process. They are entitled to cross-examine these witnesses, and they are entitled to this production. At the very least, they are entitled to production to your Honor of a reliable amount of evidence and that's what you don't have.

So I don't think the Court can get or should get distracted by saying -- and I don't mean distracted in a negative sense at all. I just mean I don't think we should focus on this idea that, well, this is not supposed to be a trial so therefore I'm going to accept

the loss. That's not what the cases say. What the cases say, if it's not necessary the Defendants are not entitled to a whole extra trial.

Frankly, when we're making these questions and the Government is saying we're trying to redo and relitigate the statement of facts and that's not true at all. In my objections to the presentence report, I reaffirmed once again Mr. Radhakrishnan fully agrees with the statement of facts; however, in my objection to the presentence report, I also stated there are some things wrong in the Government's version of facts.

So that is not all admitted and it's just the Government's version of the facts. It has no evidentiary value for that reason.

THE COURT: I think the -- I'll use a strong word, the uncontested facts that are articulated in the presentence report are appropriate and reach that level of reliability given the fact that the Defendants have had an opportunity to object to them and have not.

MR. THOMPSON: Well, I believe that -- I don't want to speak for Mr. Murphy, but I believe that Mr. Caramadre fully objected to the statement of facts in his objection to the presentence report. And on Mr. Radhakrishnan's behalf, I certainly filed an objection which included a Defendant's statement of

facts which contested many of the facts in the Government's statement of facts, those which he could possibly be aware of. So I don't think the state of the record is that there's an agreed to Government's version of the facts. That is essentially the Government's version of the facts but it's not all the parties' version of the facts.

THE COURT: Suppose these insurance companies came, just had somebody verify the previous submission?

MR. THOMPSON: If someone came in --

THE COURT: Not to come testimonial and testify because otherwise I think we have 60 insurance companies, 60 witnesses?

MR. THOMPSON: Again, the number of witnesses -- because there's lots of witnesses, that doesn't go to the Government's benefit. The Government has the burden that it has and the Defendants are entitled to due process. So the fact that there's lots of witnesses or Defendants' restitution is complicated, that doesn't go to the Government's benefit in that case. Part of the Court's job is to make sure it doesn't go against the Defendant. So if they were to come here and testify under oath and we were able to cross-examine, perhaps that would be deemed by your Honor to be reliable. I think it might be. We're not

there. It hasn't been presented to you.

We've heard from the Government about what they feel they could show your Honor if they had to but they haven't shown it. They've only shown what they actually have shown.

THE COURT: Let me just bug you because I think this is a very important point. Isn't a lot of the information that, again, on the annuity side, that appears on the Government's chart information where your clients, at least for the period after 1/1/07, would have had some firsthand knowledge of what's going on with these transactions? So for example, the premium paid is information that would have been within the possession of the Defendant at the time.

MR. THOMPSON: Some of it. I'm sure that's where the Government got a lot of that information from. The Defendants in this case turned over their hard drives and financial information long before the criminal charges in this case. So to that extent, that was fully shared.

THE COURT: That being the case, as to those numbers on the chart that came from the Defendants, and the Defendants have now had their opportunity to review what's gone onto the chart, how does that not become reliable, given what "reliability" means in this

context?

MR. THOMPSON: Because the procedure is not anything that the Government throws out there that is not specifically objected to is deemed reliable. The procedure as is very clear in the statute and the case law is the Government must present a baseline of evidence that it is reliable. If they have done so, it becomes the Defendant's burden. It's not the Defendant's burden to disagree with whatever they throw out there.

THE COURT: Basically, your argument is they have not sustained their burden of going forward.

MR. THOMPSON: That's step one of my argument. But yes, that's my argument, they have not given you baseline reliable evidence as to this loss amount. If we get into the specifics, your Honor, of the specific transactions and specific losses, I would say the same thing. The only lives that are agreed to in the statement of facts, and again we didn't hear anything on the stand in testimony about any of these lives so we have to go from what's in the agreed statement of facts are as relates to bond losses. I believe there's three measuring lives and that was in the table that I submitted, your Honor, and that was Mr. --

THE COURT: Isn't the statement of facts crystal

clear that these are included but not limited to, I think the word may be "examples"?

MR. THOMPSON: I think it says included but not limited to, but any time someone says that I don't think it's deemed that the other party is admitting to anything that the Government wants to add in the future.

THE COURT: It says the names of some of the terminally-ill people.

MR. THOMPSON: Right.

THE COURT: That means not all.

MR. THOMPSON: Just like the agent reviewed some of the numbers to make sure they were accurate. That also means not all. We don't have a list -- you don't have a list that you can be satisfied with that you have all these measuring lives. You don't have testimony from the agent that he actually verified any particular number of these numbers that they got from the insurance company.

So to that extent, your Honor, once again, you do not have the reliable information. That said, even if you wanted to expand it, your Honor, that there were other so-called measuring lives, you don't have anything in the agreed statement of facts or in the testimony that links those particular so-called

measuring life accounts to any particular losses sustained by the insurance companies. You don't have a line to draw there.

Now, you do have in a table that the Government provided at our most recent hearing date, there was a column added. And in the column it indicated what the Government felt that account's link to the overall scheme was. For the most part, what was found in those columns was whether that person was a terminally-ill person, whether they were related to Mr. Caramadre, and here and there there were some other facts. But for the most part, they were whether the person is terminally ill and whether they are related.

Now, testimony that we did have on the stand was that there's nothing illegal about using a terminally-ill person as a measuring life. That is true. That is in the record. That is the case. There's nothing wrong with it, and using a terminally-ill person does not cause any loss.

THE COURT: But isn't that an essential part of the scheme in this case?

MR. THOMPSON: I suppose it's what you meant by "scheme." You could just have easily called it an investment strategy. If you called it an investment strategy and an investor signed on with terminally-ill

people and made money, that would be legal. That's not what causes the loss in this case. That's a common misunderstanding about what went on here, but it's not the case that that caused any loss.

It's also not the case that people, the annuitant and the account owner have to be related. And so even though you find that on that last column people that are not related to Mr. Caramadre, that doesn't mean that any particular loss was caused by the fact that they were not related.

Now, we hear from the Government first time today their definition of what the scope of the scheme was, I think they said their definition was an investment made using a terminally-ill person and someone that was not related.

Now, we haven't heard that anywhere else here and that was not in the indictment, it was not in the agreed statement of facts and that was not testified to on the stand. That's a brand new definition of the scope of the scheme here. And as far as I can tell, the two principal parts of the Government's new definition that someone is terminally ill and not related are totally legal.

THE COURT: But I'm looking at the statement of facts on the first page. "The investment strategy

depended on the use of terminally-ill individuals."

MR. THOMPSON: Right. Yes.

THE COURT: So I think --

MR. THOMPSON: It's the key to this case, your Honor, to understand that the investment strategy is not illegal. Nothing happened illegal on this investment strategy. That's why the Government has taken names and transactions off of their chart. Because as we're able to point out particular ones or they found on their own particular ones that they pulled off, they were still using terminally-ill people. Some were using people that were not related, but there's nothing illegal about that.

While it's true we agree Mr. Caramadre developed this investment strategy that depended on the use of terminally-ill individuals, Agent Niro testified and it is fundamentally true that there is nothing illegal about that. That did not cause any losses. Same is true for whether people were related or not.

So I would suggest to your Honor that I believe the Government prepared that last table for use to address your Honor's concern that you didn't have a link in each individual transaction.

The reason why I bring it up is the fact that a column was added where it indicates someone was

terminally ill or someone was not related to Mr. Caramadre is not that link you were looking for and therefore it doesn't make that connection that you were required to find for each account and it doesn't somehow make that monetary loss somehow within the scope of a conspiracy just because an annuitant was terminally ill. That was entirely legal and it happened countless times where that was not illegal and those -- and at least some of those were initially on the chart or overruled or that kind of thing because it is legal.

THE COURT: So in those instances where the connection simply has "annuitant terminally ill," "annuitant and owner unrelated," those are not enough? Those transactions should drop off?

MR. THOMPSON: That's certainly not enough, your Honor. I misplaced my copy of that table so I'm just looking around for it.

If I could go on, your Honor.

THE COURT: Yes.

MR. THOMPSON: Although you have a general idea here of how this investment plan or scheme, however you want to call it, worked, again there's no showing that any agreed-upon lives led to any losses. There's no showing that any of these falsehoods led to the

issuance of particular annuities and there's no showing they led to any specific annuity accounts or bond accounts specifically. So for that reason, once again, we don't have a showing as to particularized losses.

Just briefly, your Honor, and I'll only stay on this for a moment, but I would suggest to your Honor that within that annuity chart there are two columns which I quarrel with and I question the accuracy of. One of those columns is the column for bonuses. And if you recall, those bonuses is money put into the annuity account by the insurance company and the other column that I question, your Honor, and I feel it's unclear and unsubstantiated in many of the individual cases is the commission column.

The reason why both of those, your Honor, I would suggest are unclear and not reliable for the purposes of restitution is that there were clearly certain cases where bonuses, while they were put into the account for investment purposes, were not paid back at the end of the transaction. And so for example we have the transaction on --

THE COURT: I thought the testimony was that the bonus went into whatever was the designated investment.

MR. THOMPSON: Yes.

THE COURT: And at the end, when the annuity

came to be paid out, if the total investment had dropped, which was likely because it had been placed in something that was very risky, both the bonus and the premium were gone. The insurance company had left only what was in the investment account but had a contractual obligation to pay to the beneficiary the amount of the premium plus whatever were the particular bells and whistles of that annuity.

MR. THOMPSON: I agree with that.

THE COURT: So that from the insurance company perspective, the bonus is gone.

MR. THOMPSON: Right. But in certain circumstances, your Honor, the bonus was not necessarily lost because, for example, the account dropped only small amounts less than that bonus would have been or it didn't drop at all. And I gave the example with the agent, it's on page five of the Government's table where the premium was -- the owner was DK, LLC, the annuitant was Jason Veveiros and the total premium and the payout were $2,450,000, there was a bonus listed that was added on to the loss amount. However, it's clear from the numbers that the bonus did not, in fact, go back, get paid to the beneficiary in the "payment to beneficiary" column.

Now, the agent speculated that that was because

this account was surrendered but in fact the total premium was $2.45 million and payment to the beneficiary was $2.45 million. That's one example of although the bonus payment was apparently made and must not have vested and therefore it really shouldn't be included onto the loss amount.

If you remember, when Mr. Vilker presented one of these prospectuses, it talked about that the investor would have to pay a premium of .8 percent, for example, per year essentially to buy that bonus at the beginning. There's also a chart at the very bottom of that page that talked about when the bonus vests. It really took over I believe 8 to 12 years, I believe it was 8 but I could be wrong on that chart, to fully vest and it didn't vest in the very beginning.

I agree with your Honor if the overall value of the account went down so much, of course the bonus was gone. I absolutely agree with that. I'm just suggesting at other times it did not drop where it also was not vested, was not paid to the beneficiary but for some reason it still appears on that chart. And for that reason I think the bonus column is unreliable.

And I make the same argument generally, your Honor, for the commission column because I think in some cases the commissions were charged back.

Apparently there were some instances where the insurance companies report those charge-backs; there were some instances where the insurance companies did not report those charge-backs.

THE COURT: Let me stop you there. I do recall there were instances the charge-backs were reported by the insurance companies. I thought I recall the agent's testimony that he was not aware of anywhere the insurance company had failed to. What he instead said it was theoretically possible that the insurance company had reported commissions and failed to pick up charge-back but he wasn't aware of any instance for that that happened.

MR. THOMPSON: I will tell your Honor I have a note but I can't say my note disagrees with your interpretation either. I interpret it one way. Certainly it's your Honor's memory, but I'm not going to press on that issue because frankly I'm not sure at this point.

I'll move quickly to the bond losses. I know Mr. Murphy is going to address this a little bit more. The Gushlak case, G-U-S-H-L-A-K, makes clear that the restitution statute requires a showing of actual loss. Doesn't have to be exact as Mr. Vilker made clear, and I agree with him. Doesn't have to be an exact precise

amount. But actual loss does mean it can't merely be hypothetical or speculative.

I would suggest that Dr. Kalotay, while he's clearly very intelligent and knows bonds, I would suggest inside and out his testimony about how a corporation would repay bond money was entirely speculative and hypothetical, and his basic premise was that the only way to pay back bonds was to issue new bonds. That simply cannot be true. Even in his own example and Mr. Vilker's example of the mortgage, it is true that if I had a bank call me today and say I'd have to pay off my mortgage tomorrow I would have to get a new mortgage to cover at that time and I would be victim to whatever the prevailing rate is. However, if I had enough money, cash on hand, I could use cash on hand to pay off that mortgage and maybe I would sustain loss from that hypothetically and maybe I wouldn't. That all depends on do I have cash on hand, and do I have --

THE COURT: But from a business perspective, if you have cash on hand it's because it's cash that you want to marshal in the business. And if you're not marshaling it in the business but you're instead using it to retire debt, then the cost of cash, because cash is something that when you're thinking about the world

from a business perspective, costs money.

MR. THOMPSON: Yes.

THE COURT: The fact that you're paying back with a dollar that can only be replaced for more money necessarily means that you've sustained a loss.

MR. THOMPSON: Well, it does but we don't know what that loss is. In your example that you just gave, your Honor, if you're marshaling cash, it must be for a different reason. We don't have any kind of analysis of what these corporations sustained because they weren't able to put capital. We have one hypothetical way they raised the money. We have to put the cost of that in the hypothetical way.

THE COURT: Isn't the cost of raising money always how you value the loss of cash? I mean that's not speculative. That's a pretty standard way of approaching a circumstance where we're dealing with the commodity known as cash which has a time value. And the essence of this scheme is timing. So it seems like it's not speculative and it's not hypothetical. It really is becoming a way to capture a loss where the loss is embedded in the time value of money.

MR. THOMPSON: In a certain sense it is, your Honor, but also we have to factor that they don't have that debt on their books anymore. Interest rates can

fluctuate. Dr. Kalotay agreed that the numbers that he came up with previously could have changed by now and that in some instances based on the extraordinarily low interest rates of today, it would actually be as of today's dollars it was to these corporations' benefit that they actually retired these debts early. That was his testimony as well.

THE COURT: But in the moment, in the moment when they had no choice but to either take more expensive cash or go raise the money some other way, I mean, obviously, a bond issuer that's issuing 15 billion in bonds doesn't go back into the bond market to replace his losses that are this small relative to the cost of doing business, but nevertheless, that cash that's now gone from their operating money has value and what better way to value it than to look at that entity's ability to borrow that amount of money in the moment when the money has to be repaid.

MR. THOMPSON: My suggestion is that we don't know that they have to borrow the money nor that amount, and we cannot say that they have that actual loss. I would suggest it is speculative, but I understand your Honor's argument on that.

Again, the mortgage example goes both ways, and it shows, frankly, how complex this is and we can't

simply say how much does it cost to replace that money today. You have to look more broadly than that. As history has shown, interest rates have plummeted. What seemed as a loss then might not in fact have been a loss today. Then we get into more complexity, which is when do we measure the time of loss. I would suggest, your Honor, overall as to annuities and the bonds that your Honor does not have enough information to make any reliable finding of the restitution due and owing in this case.

You do not have the ability, I don't think, based on reliable evidence to say which of these companies lost what amount of money due to any of the particular acts of the Defendants in this case. While there might have been some losses overall, you don't have reliable evidence to tie that to any particular accounts, any particular transactions and for that reason, your Honor, I believe the case law and the statute is fairly clear, I think the Court is unable to issue a reliable restitution order. Thank you.

THE COURT: Thank you.

Mr. Murphy?

MR. MURPHY: Judge, thank you. Your Honor, on behalf of Mr. Caramadre, I would incorporate and join in on Mr. Thompson's arguments as it relates to

annuities. I will start with bonds first and then circle back briefly to the annuities.

Your Honor, as to the bonds, on behalf of Mr. Caramadre, we're saying that there is simply no loss. One of our exhibits was the prospectus that was entered from GMAC was a $15 billion bond issue. We're not sure out of that particular bond issue how many of that 15 billion were actually issued.

However, the cross-examination of Dr. Kalotay, I think, showed that his analysis, one hired by the Government, was pure speculation and based on hypothetical examples.

Now, Mr. Vilker on his redirect of Mr. Kalotay asked a question about a mortgage, and I don't think the mortgage example applies or should be controlling your Honor.

Judge, Dr. Kalotay, who was qualified as an expert, I think all parties agree he's a very, very bright individual who has worked with bonds throughout most of his professional career, and at one point testified that he did not know when asked by me that particular time that you could hold these death bonds in joint tenancy. He did not realize that at first, and he said that from the witness stand when he first began his expertise or his research for the Government

he did not realize at first that these bonds could be held in joint tenancy. I think that is important, your Honor, because the Court has asked Mr. Thompson some questions as it relates to annuities as about the so-called scheme.

Judge, I am arguing to this Court that there is nothing wrong as it relates to bonds to have a joint tenant who is dying to have a bond purchased by another joint tenant. There doesn't have to be any relationship between the joint tenants. In fact, the joint tenants to my knowledge do not have to know each other and the bond issuers do not require that. In fact, Judge, it came from Dr. Kalotay and it is in the prospectus that when a company goes to market to sell bonds to raise capital that the prospectus is the document that goes from cradle to grave with that tranche of bonds that is issued and a purchaser of bonds has to accept what is contained, the terms and conditions contained in the prospectus. A purchaser cannot dictate any terms to the bond issuer. You take it or leave it as according to the prospectus.

And the prospectus as Dr. Kalotay admitted goes from cradle to grave.

Judge, with the bonds and Dr. Kalotay agreed to three but maybe not the fourth, there are in essence

four ways to retire a bond. One is if the company decides to call it, and that's important because when we look globally at the economic times that were going on during 2007, 2008, 2009 and today we see what happened in the world economy and United States economy with bonds; second is the maturity date of a bond, which would be spelled out in the prospectus; third is if the bond offers the feature of being a so-called death-put bond; and fourth that we don't have to get into is a separate kind of court action, bankruptcy, et cetera.

But Judge, these bonds are marketed and part of their attraction, as Dr. Kalotay attested to, was their attractiveness is enhanced by the fact that they have a death-put option in them. And Dr. Kalotay compared them to flower bonds that had previously been issued by the United States of America, but I believe in 1996 were discontinued and the reason for their discontinuance was people would not buy them at face value. They would buy them below face value. And at the time of death they could use the whole face value for estate tax purposes, akin to Rhode Island with historical tax credits where the face amount, $1,000 might be purchased for $300 but at the time of death for estate tax purposes you put the whole $1,000 and

the United States Government, the Treasury decided to do away with that. Dr. Kalotay was familiar with that and the Government got involved with death-put bonds.

Judge, why it's important is Dr. Kalotay was qualified and he told you and he told us that his expertise is in debt management, and he sits down with these companies prior to the issuance of a bond to look at how they are going to manage their debt, manage their risk, et cetera. And I would proffer to the Court that is all taken into consideration before bond one is sold. In fact, in the prospectus that is introduced as the Defendant's exhibit, there are certain sections that tell the purchaser of the bond that only a certain number of bonds can be put in a year based on the death-put option. There's a certain limited percentage, a certain number.

Also, Judge, there's a certain value that each decedent's estate can put forward as to the amount of a death-put bond. Why that's important is because the companies when they issue them, they know actuarial studies have shown and based on their prospectus that there's only going to be a certain number of bonds that will have the exercise of the death-put in a calendar year. And if that number gets above the level, they simply will not pay that bond. They will not accept

the death-put on that bond.

THE COURT: I thought Dr. Kalotay testified that those levels were set very, very high to avoid sort of catastrophe and that they were not -- it was not expected -- they were not set at a level where there was an expectation that within sort of normal actuarial given back and forth you would end up saying, no, that we're not going to allow the next one to be redeemed because that's getting to be too much, and that that just didn't happen.

MR. MURPHY: I actually think the death-put limit is set very low in relation to the bond.

THE COURT: Well, in relation to the total issue, it was. But in relation to the likelihood of a per annum number of redemptions, it was set, I thought he testified, very, very high so that it would be a very unusual event. And I'd have to look at the testimony, I thought he said he'd never encountered it happening.

MR. MURPHY: Judge, and he was asked also if he checked with any of the bond issuers to see if they had reached their maximum level during one of the calendar years when these bonds were in question. My memory of that testimony was that he said, no, he had not checked with the bond issuers.

THE COURT: You're right about that.

MR. MURPHY: It's my understanding that that level is a low level because the company is trying to protect itself so they don't have a high number of death-puts during any given calendar year. In fact, the person who purchases the bond irregardless of what time they purchase the bond and in the maturity scale, if a person knows that -- a person sometimes would not know how many death-puts there were according to a certain issuer of bonds in a calendar year. The company uses that going into knowing that if that level is ever reached they would not accept any more. But Dr. Kalotay had never checked on that, your Honor. That was his testimony. He never called into the companies.

Why that's important, your Honor, is because the companies already take into account if they do offer the death-put option which makes their bond more marketable. Marketability does play a key role and the insurance company through its debt management before they put it out realizes that a certain percentage of bonds that do have this feature will be put to be paid.

Importantly, too, when the company sells a bond, the bond is sold at face value minus a very, very small percentage of cost that it takes for the house selling

it, the bank that's managing it and so forth.

But I would add that the real loser here could be the person on the secondary market that sells the bond because when an owner of the bond purchases it on the secondary market, there's no relationship between him and the company other than he has bought a bond from another individual or concern on the secondary market. It's still governed by the prospectus because it goes from cradle to grave. And if somebody is able to buy that bond at 65 cents on the dollar, that's the person that's lost money, not the company, because the company has already received a hundred percent or close thereto when it markets the bond and it's sold. The company has no concern who buys the bond on the secondary market.

Judge, with respect to Dr. Kalotay, he said simply he did not call into the companies and he didn't look at that entity's borrowing costs specifically. He didn't go into GMAC. He didn't go into some of those other companies to look to see at that particular point in time what their borrowing costs would have been. I'm saying that's not necessary if the Court feels he simply didn't do it. I'm saying the company had already taken it into consideration when they issued a bond pursuant to the prospectus.

THE COURT: When the company does the actuarial analysis to think about what's the likelihood that they're going to be seeing redemption, they're not factoring in what we have with the scheme. So they're not factoring in that there would have been fraud involved in procuring the terminally-ill individual, fraudulent statement made to the brokers who are marketing the bond, the aspect of the scheme dealing with the trading houses, Ameritrade and E-Trade who as I recall one by one began to understand what was going on with the scheme and then tried to shut it down and it was moved to another trading house. So that's the essence of the scheme and that's what the issuers don't take into account and that's what's leading to these premature redemptions. And I'm using the word "premature" because I'm linking it to the fraud and the fraud is the essence of the scheme.

So these are not people who got hit unexpectedly by a bus and therefore maybe the owner of a bond or a bond account is an entity and the insured life is the CEO and the CEO gets hit by a bus and the account -- the owner wanted a death-put feature because they wanted to make sure if their CEO dies they would want to get back the full amount. That's not what the essence of this scheme is. The unifying theme here is

the fraud.

So I'm struggling to understand how that isn't a loss, how that isn't something that's different from what these bond issuers, actuaries thought about when they anticipated that there's going to be a certain amount of redemption.

MR. MURPHY: Yes, your Honor. Judge, first a company as a legal entity would never buy a bond with a death-put. It simply doesn't happen. Dr. Kalotay testified to that. It would be the individual where a death-put becomes something that's attractive. And quite often prior to these death-put bonds would be flower bonds, quite often it was the elderly who for later life planning, et cetera, who would be the purchasers. There is nothing wrong in this case, I don't think the Government has alleged that and it simply is against the testimony, there's nothing wrong with an individual to go out to find somebody who is dying and to say: "I will give you $5,000. Let's be joint tenants on a bond." There's nothing wrong with that. That is not the fraud. The fraud has to do with whether or not there was a misrepresentation to the joint tenant on the account, whether they were duped into signing a document, but the mere purchase of a bond by joint tenants who might not be related and

might not have ever met is not illegal.

THE COURT: Right.

MR. MURPHY: Judge, I think that the companies themselves -- and I respectfully beg to differ with the Court. The companies themselves figure out in a given year that they will only allow a certain percentage of the bonds that have been sold to be put as part of the death-put option. And if you're just taking a number, if the number is ten and one year Company A has six death-puts, well, they've based the number at ten figuring that is the risk or the debt management that they can handle at the time. One year it may be six, one year it may be eight, one year it may be five. I believe there may have been cases when Mr. Caramadre could not have put a death-put because a company may have already exceeded their limit. So I would say that the companies have already taken that into consideration.

Now, Mr. Vilker with the mortgage, I think it's comparing two different things. Obviously, if you have a mortgage at three percent and a bank called that mortgage in and now for you to go out and repay that and if your only method of repayment is to remortgage that loan and you have to get a mortgage at five percent, yes, it's two percent of whatever that value

is and that's the percentage you're going to pay. There's no evidence here that any of these companies had to go out and borrow money and reissue new issues of bonds to pay back what they say here is a loss because of fraud. In fact, Judge, I think Dr. Kalotay's testimony was that part of his work experience that he's an advisor for the Tennessee Valley Authority and that they didn't even know that they were part of this indictment; and no, Tennessee Valley Authority according to what I believe Dr. Kalotay said did not have to go and re-borrow because the number is so small compared to what these companies are doing that simply, Judge, on behalf of Mr. Caramadre we say that there was no money lost whatsoever, that the bond issuers knew this, that when they sold the bond they received a hundred percent of their money going in. The only time they had to repay a portion of it was during the death-put as relates to this case and there's been no showing that they had to go out and borrow any money to repay. It could have been money they had on hand. They could have gotten the money from different areas. We're saying it's not a loss.

I believe Dr. Kalotay said he didn't know and he didn't look at an individual entity and do a study

based on that individual entity. He did it hypothetically, was simply that some of these companies could have benefited by paying the bond early because we're looking at the period of time in 2008 when bond rates were higher and obviously today the interest rate is lower so some of these companies, Judge, could have actually benefited. Again, I don't know specifically each and every company.

THE COURT: I thought the testimony on that point was that because of the timing that the purchase of the bond at a discount meant that at the time of purchase, at least, that issuer's ability to replace that cash in that moment was necessarily going to be more expensive than what that cash had cost pursuant to the bond issue. So that if you redeem it within a pretty short amount of time afterwards, you have, I think his words were, by definition you have a loss.

MR. MURPHY: Judge, if GMAC sold a bond last year for $100 and Mr. Thompson bought it for $100 and then he sold it nine months later for $65 and I purchased it in joint tenancy with Mrs. Smith who is about to die, GMAC already received the $100. Mr. Thompson sold it at $65, suffers a loss of $35. Why was it a loss to Mr. Thompson? We don't know why he sold that bond in a secondary market. Maybe he

needed fast cash to be liquid in another investment. There's no relationship between Mr. Thompson selling the bond to me on a secondary market. So as far as GMAC, we don't know what their status is at that finite point in time because Dr. Kalotay did not go into each company and look at their borrowing curve to look at their specific index. He did it hypothetically. In fact, Dr. Kalotay at first I on proffering to the Court did not realize that that bond list that was part of the Government's big exhibit, I think it was items 1 through 14, didn't realize on that bond list that many of those were actually CDs. He first said, yes, they're all bonds. When I asked him on cross-examination and then later when I pointed out to him that they were CDs, I think his exact words were he had heard it somewhere. He wasn't sure if he heard it in his office from his two associates or heard it from a Government agent.

But again, looking at a list, I think it's Exhibit 14 from the Government, your Honor, where there's the category of so-called bond issuers from exercise of survivors option again after July 1st, 2007, many of those issuers are not companies that issued bonds. They're simply CDs, certificates of deposits which are controlled by the FDIC. And

Dr. Kalotay, I believe, did not answer anything about the CDs other than knowing afterwards that he realized that some of them were here.

THE COURT: I recall that, his testimony about the CDs, and I thought Dr. Kalotay ultimately said that for purposes of his loss analysis, there wasn't a material difference. Are you arguing there is a material difference between a CD and annuity for purposes of doing a loss analysis given the nature of the crime?

MR. MURPHY: I'm arguing that the CD is simply a bank selling it to a person is controlled by a different document than for instance the GMAC prospectus that I showed you, and I'm not sure what the bank did with their money. So again, a bank has taken that into account. There's nothing illegal about purchasing a CD in joint tenancy with one of the individuals being critically ill. As Mr. Thompson has pointed out, the fraud isn't the purchase.

Now, if I can shift a little over to the annuities, Agent Niro testified and testified correctly that there is nothing wrong with an individual, an owner of an annuity and an annuitant not being related, not knowing each other, not having one person buying an annuity and using the annuitant. There's nothing wrong

with that. In fact, when he was asked about health questions, I believe his answer was he didn't know or he didn't check. Again, in the Government's exhibit as it relates to annuities, there's no evidence from the Government and they have the burden, I know it's a low burden, but there's nothing that says any of these companies had asked for a medical exam of any of the annuitants. We're proffering that they didn't and it didn't matter. They didn't care. Things may have changed today but at the time when these annuities were purchased there was simply no question, no medical documentation, nobody was sent for a physical. And there's nothing wrong with an owner of an annuity to not be related to an annuitant.

With the annuities, Judge, the owners that are not -- and I say this for purpose of this argument, the owners of these annuity policies have not done anything wrong.

Now, what I mean by that, so Mr. Vilker doesn't object, is I'm talking about the owners who are not Mr. Caramadre, Mr. Hanrahan, Mr. Maggiacomo. I'm talking about the individuals who were not charged, who were simply owners of policies that found their way into this case. They did absolutely nothing wrong. So when we look at the annuities themselves, when we look

at the indictment and again as Mr. Thompson said and I won't belabor the point, but there was a statement of facts that my client and Mr. Caramadre signed last November, and those facts do not list every annuity. And then the plea, your Honor, was to two counts. It was to Count IX, which involves a terminally-ill person who fortunately did not pass away, Mr. Rodriguez. That was one of the pled counts, Count IX, and that dealt with the bond. And Count XXXIII was the conspiracy with Mr. Caramadre and his Co-Defendant.

But when we look at the Count XXXIII, the conspiracy to commit offenses against the United States, that refers to beginning on or about July 2007. And one of Mr. Caramadre's arguments is that there's been no proof of any fraud as to the annuities prior to July 1st of 2007, that on the summary of gains and losses of variable annuities provided to us by the Government, there are scores and scores of annuities that are listed prior in time to July 1st of 2007. And the conspiracy was from '07 forward. And as to the annuities themselves that were purchased before, whether they were owned by Mr. Caramadre, Mr. Caramadre and a company he controlled, or by an innocent owner that there's simply been no showing of fraud that he had pled to so therefore we're saying those losses

cannot be attributed to him.

THE COURT: Let me make sure I get that point, Mr. Murphy. Your argument is that for annuities prior to the beginning of the conspiracy, that there's no evidence in the statement of facts, in the plea? There's nothing in the statement of facts that adds the element of fraud as to the pre-2007 annuities?

MR. MURPHY: If I can go first from the indictment, your Honor, as to Count XXXIII because that was the conspiracy, it alleges paragraphs 1 through 21, then it lists exactly what the frauds are: Identity fraud, wire fraud, mail fraud, aggravated identity theft. And what I'm saying, your Honor, is, again, to go back to nothing being wrong with a person buying an annuity, not being related to a critically-ill annuitant is that the fraud itself is not that. The fraud is if you took somebody's identity as alleged in paragraph 168, Section C, the object of the conspiracy details the manner and means but it starts on July '07 to August of 2010.

It does say in the statement of facts, to get back to her Honor's question, on page one it does say in addition from 1995 through August 2010, Caramadre executed a scheme. Again, Judge, "scheme" has a nefarious connotation.

THE COURT: It does.

MR. MURPHY: A scheme could be legal. There are other countries where a scheme is something legal. Here in the United States it has a negative connotation.

THE COURT: And when it comes to the calculation of restitution, it has a specific meaning.

MR. MURPHY: Again, the Government wrote the indictment. If the statement of facts is the only thing controlling, I would say that that can't be, your Honor, because Mr. Caramadre pled to the counts of the indictment. He did adopt the statement of facts. He did assign to it.

Judge, if I may have one moment with Mr. Olen. He sent me a note. I can't read it.

(Pause.)

MR. MURPHY: Judge, I would furthermore argue that if the statement of facts is what's controlling the restitution hearing or controlling on the plea, along obviously with the plea to Counts IX and XXXIII, and we're not talking about the PSR. In fact, Mr. Olen had made an objection to the PSR. I know Mr. Olin Thompson made objections to the PSR in which he questioned some of the Government's statements of fact. If the statement of facts as it relates to the plea as

signed by my client and the Co-Defendant is not sufficiently inclusive as to what annuities were fraud or what annuities they should get restitution from, it's the Government's problem. It's not the Defendant's problem.

So I would say if there is a question as to the inclusiveness in the statement of facts and there had not been any showing of fraud as to the particular annuity, it's not the Defendant's burden.

Thank you, Judge.

THE COURT: All right. We're going to take a short break unless Mr. Vilker tells me he has nothing more to say, which I find hard to believe.

MR. VILKER: Five minutes, not more than that.

THE COURT: Our stenographer is overdue for a break so why don't we take five minutes.

(Recess.)

THE COURT: Mr. Vilker.

MR. VILKER: Your Honor, I'll be brief. It's been a long afternoon.

The most basic comments I want to make, it seems like we're at a complete disconnect with the defense in terms of the scope of the hearing, what's permissible in evidence and the role of the indictment in this case and the role of the statement of facts in the pros

version. Let me start off with what Mr. Murphy said about the scheme to defraud, which I think with all due respect is incorrect.

The Defendants pled guilty to the entire scheme to defraud. There's 52 pages of fraudulent conduct described in that. They pled guilty to specific Count IX, which is one of the wires sent in furtherance of that scheme to defraud. And above that in paragraph 164 of the indictment, it indicates: On a date specified below for the purpose of executing the aforementioned scheme and artifice to defraud, the Defendant did knowingly transmit and cause to be transmitted the following wires.

So they admitted sending one wire in furtherance of the scheme to defraud. They admitted to the scheme to defraud. And the change of plea hearing, your Honor, we negotiated statement of facts frankly for this very moment to make sure that the Defendants were on record and their own signature admitting many of the critical facts of this case.

But the plea hearing could have been do you, the Defendant, admit that you're guilty of Count IX of the indictment. If they said yes, that would have been sufficient as long as the Court was satisfied there was some factual basis, but the Court was because we were

in the middle of trial. That would have been sufficient.

If the indictment lays out the scheme to which the Defendant pled guilty which started in 1995 and ended in 2010, the indictment -- and another kind of basic point we disagree with Mr. Thompson, we're not saying the indictment is actual evidence against the Defendants. It's a charging document. But for purposes of this hearing, the indictment lays out the scope of the scheme.

If you read the four corners of the indictment, you see what's charged in there to the counts the Defendants pled guilty. What isn't in there they can't be held responsible for. What is in there lays out the scope of the scheme.

I believe your Honor cited to some cases that hold just that. That was always my understanding coming into this. They could have just come into court and pled guilty to Count IX or then the whole analysis would have been what is in the scheme to defraud.

Both Mr. Thompson and Mr. Murphy indicated that the Defendants had filed objections to the prosecution version and the statement of facts. Neither myself nor Mr. McAdams are aware of any such objection being filed to the facts of the case. They filed objections to

different guideline issues. They never objected saying we don't believe Annuitant X was deceived or we didn't lie to this insurance company. If they had, we would have responded factually and their objection would have put us on notice that we had an issue and would have given us an opportunity to present evidence of that. They didn't, and every single statement of the prosecution version must be accepted as true for the purposes of this restitution hearing.

The other kind of fundamental --

THE COURT: Mr. Vilker, on that point, can you cite me to something that stands for the proposition you just stated?

MR. VILKER: Well, I know that -- I was looking at this before the hearing today. I know that Rule 32 gives the time by which the parties must object.

THE COURT: For the objection.

MR. VILKER: We never saw any objection so there seems to be some kind of misunderstanding of what was put in as an objection. Since they have not objected, since that time for objecting has passed, obviously we have nothing to respond to, by definition it must be waived.

Mr. Thompson made an argument that Agent Niro's testimony wasn't sufficiently reliable and we should

have been required to bring in representatives from each of these insurance companies to testify as to the loss. I would point out, your Honor, that at trial in this case as we advised the Defendants in the pre-trial memorandum, which was stipulated to before the trial, we were going to have this exact same testimony at trial of Agent Niro coming in and testifying as a summary witness to the losses that each of the -- and gains but also the losses that each of these insurance companies sustained. And the Federal Rules of Evidence clearly provide under Federal Rule 1006 that when the underlying records are voluminous, the Government can introduce summary charts and summary witnesses to explain it, explain the voluminous records as long as they have been produced to defense beforehand, which they have been.

So Agent Niro's testimony wasn't even hearsay. It's completely admissible even at trial under the Federal Rules of Evidence much less at a restitution hearing where the Federal Rules of Evidence don't apply. The Government has met its burden of bringing sufficient indicia of reliability when that testimony would have been the actual testimony at trial and was the planned testimony at trial.

The other kind of core objection we have is the

role of the statement of facts. The list of those 23 people that Defendants keep pointing to was never, ever intended to be exclusive, exhaustive. And the Defendants cite that. They're just glossing over as if it's not there the other five pages of the statement of facts that talk about all the other aspects of this scheme, including the lies to the insurance companies on the application forms, the lies to the brokerage houses, using financial nominees to commit money laundering. They argue as it's not there, not part of the indictment and not part of the statement of facts but they've admitted to this. And that brings all of these various investments within the scope of the scheme. And what they essentially seem to be arguing, your Honor, is that we would need to have another trial to prove that each and every annuity and each and every brokerage account showed a specific fraud in each transaction and that merely by saying this is a terminally-ill person that's unrelated that's insufficient to meet our burden.

The indictment, the pros version and the statement of facts lays out why those accounts are all within the scheme and the alternative would be simply to do what we thought we succeeded in avoiding, which was avoiding the rest of a lengthy trial because the

Defendants admitted their guilt. We could on each of these transactions call witnesses, call these family members who say, "I didn't know anything about that account. That's not correct information about my investment history." Call representatives from these companies, play tapes where the Defendants lie to the companies. Call the companies where they met with Mr. Caramadre and Mr. Radhakrishnan and they told me the terminally ill people were the ones investing and it was their money. We can go on and on and on and on.

As your Honor indicated, there's a treasure trove of lies. What that would basically do is transform this into a trial and raise our burden beyond what is necessary that would show as a scheme agreed in the statement of facts as detailed in the pros version these companies lost this amount of money that we can show with reasonable certainty.

That's all I have, your Honor.

THE COURT: Thank you, Mr. Vilker.

Anything further from either of the Defendants?

MR. THOMPSON: No, thank you, your Honor.

THE COURT: Mr. Murphy?

MR. MURPHY: One moment, please, Judge.

THE COURT: No problem.

(Pause.)

MR. MURPHY: Thank you, Judge. Judge, just very briefly.

Your Honor, as to the prosecution version and the Presentence Investigation Report, Mr. Olen, Randy Olen does indicate that on September 30th he did submit to the Probation Office an objection, and part of it is that Mr. Caramadre believes that his guilty plea was tendered in violation of his constitutional guarantees and therefore he objects to any and all language in the PSR. I'm told by Mr. Olen it was also electronically filed.

THE COURT: I have a copy of that objection.

MR. MURPHY: Judge, as it relates to Mr. Caramadre as to the summary of gains and losses of the variable annuities, I would direct the Court to the indictment itself and I would point out that on page 53 to 55, there are only two annuities listed according to Mr. Caramadre, that being Count IXX and Count V, and that on page 57 there are four annuities listed and that those annuities are from a period of time of 2009; that on page 61, there are two annuities, and on page 62 there's one annuity. So out of those roughly 59 counts, there's only a handful of annuities simply saying according to Mr. Caramadre that if the Government had proved that the earlier annuities were

done with fraud they would have been charged, and simply now to go back and ask him to pay restitution for specific ones that weren't proven to be fraudulent would be incorrect. Thank you.

THE COURT: Thank you, Mr. Murphy. Any rebuttal?

MR. VILKER: No, your Honor.

THE COURT: I will take this under advisement. In light of the teaching in the two cases that Mr. Thompson struggled to pronounce and I'm not going to struggle to pronounce, if I discover that there is some quantum of information that based on all the facts and circumstances suggests is in the possession of the Government and the lack of that evidence causes me to be unable to find that the Government has yet sustained its burden, I will have a conference with all counsel to discuss how to proceed, but hopefully I will be able to keep everything on schedule and mindful of the fact that the sentencing itself is coming up on the 8th of November and that Judge Smith expects me to make my Report and Recommendation prior to that date, that is my intent. But I will be in touch with the parties in the event I run into an issue regarding whether the Government's burden on a specific point has not been sustained is clearly submitted. Anything else I need

to be mindful of? Mr. Vilker?

MR. VILKER: No, your Honor.

THE COURT: Mr. Murphy? Mr. Thompson?

MR. THOMPSON: No, your Honor.

MR. MURPHY: No, your Honor.

THE COURT: All right. The Court will be in recess.

(Court concluded at 4:50 p.m.)

C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Anne M. Clayton

_____

Anne M. Clayton, RPR

December 20, 2013

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Date